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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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| In the Matter of | ) | |
| | ) | IB Docket No. 96-111 |
| Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Services In the United States | ) | |
| and | ) | |
| Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations | ) | CC Docket No. 93-23<br>RM-7931 |
| and | ) | |
| COMMUNICATIONS SATELLITE CORPORATION<br>Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the Intelsat K Satellite | ) | File No. ISP-92-007 |

To: The Commission

## COMMENTS OF COLUMBIA COMMUNICATIONS CORPORATION

Columbia Communications Corporation ("Columbia"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby comments on the Commission's Further Notice of Proposed Rulemaking, FCC 97-252, slip op. (released July 18, 1997) ("Further Notice") in the above-captioned proceedings. Columbia has previously participated in all prior phases of these proceedings, including its filing of Comments and Reply Comments in July and August of 1996 concerning the initial NPRM. Many of the points made in these earlier filings remain valid, principally with respect to application of the ECO-Sat test to non-WTO members,

and should be acted upon in the Commission's adoption of a final Report & Order.[1/] In these comments, Columbia limits itself to addressing those particular issues expressly raised or implicated by the Further Notice.

## I. ECO-Sat Treatment of Inter-Governmental Satellite Organizations ("IGOs") and Their Affiliates.

The single most important remaining issue in this proceeding in Columbia's view is the manner in which inter-governmental satellite organizations ("IGOs") such as Intelsat and Inmarsat will adapt their structures and services to the private competitive marketplace, and on what terms these new privatized entities will be permitted to expand their services to include the U.S. domestic market. In the Further Notice, the Commission notes that an ECO-Sat test is problematic with respect to IGOs "since no single nation can realistically be deemed the home market of an IGO." Further Notice at ¶ 31. At the same time, the Commission notes that IGOs do not benefit from the terms of the WTO Basic Telecom Agreement, and thus some analytic model is necessary for consideration of IGO expansion of service to the U.S. domestic market. *Id.* at ¶ 32.

Intelsat and Inmarsat, as presently structured and regulated, have tremendous inherent advantages over newer private competitors based upon both their treaty-based privileges and immunities and the ownership stake in these entities held by many market-dominant carriers in nations throughout the world. These special privileges and relationships have an inherent market-distorting impact that cannot be gauged based on traditional economic measures of market

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1/ It is Columbia's understanding that all of the comments and reply comments filed in 1996 will be considered along with the additional views submitted in response to the current Further Notice.

power or openness. For example, even though concessions made by WTO Members that participated in the Basic Telecom negotiations will result in more open regulatory processes in many countries, the IGOs themselves will still not be subject to regulation, particularly antitrust enforcement, in any nation.

Accordingly, restructuring and pro-competitive privatization of the IGOs, including an end to their antitrust immunity, are prerequisites to any expanded U.S. market access by IGO satellites. No existing IGO or IGO affiliate should be eligible to seek entry to the U.S. domestic market prior to the effective date of such reforms because there is no reasonable means of applying effective competitive opportunities standards to these protected international consortia, or of ensuring that they do not engage in anticompetitive conduct. Only legitimate successor entities that are fully privatized and divested of their intergovernmental character and treaty-based privileges and immunities should be deemed eligible for consideration for service to the U.S. domestic market.

Following privatization, entities that have been created as assignees of Intelsat or Inmarsat assets, but which have an entirely separate investment structure and no special treaty privileges, can be evaluated under the applicable market entry test, either a full ECO-Sat analysis or the streamlined WTO member standard. Nonetheless, if any vestigial IGO entity remains for provision of either fixed or mobile satellite services, the Commission will need to remain vigilant and review carefully, as part of its public interest mandate, any ties that remain between any carry-over IGO entity and a private entity that has been assigned a portion of assets. *See* Further Notice at ¶ 36.

The United States has committed not to grant access to future IGO spin-offs unless the resulting entity meets fully U.S. law and policy with respect to fair competition and is totally devoid of IGO ownership or privileges and immunities. Columbia expects that the Commission's rules and its analysis of IGO spin-offs would be completely consistent with this commitment by the Executive Branch. See Attachment A for a copy of letter from Charlene Barshefsky, U.S. Trade Representative to Columbia Communications Corporation, dated February 12, 1997.

## II. The Commission Should Take Steps To Prevent Opportunistic "Forum Shopping" By Satellite Operators.

### A. The Commission Should Apply Its ECO-Sat Test Using The "Home" Market Of Each Operating Entity In Instances Where This Market Is Not A WTO State, Regardless Of Where The System Is Licensed.

Columbia believes that the applicability of market entry standards to applicants from WTO member countries, and to applicants from other nations where the ECO-Sat standard would still apply, is straightforward, and that the Commission should adopt its approach as proposed. However, the Commission also seeks comment on a circumstance that falls between these two procedures — "where an applicant proposes to provide service between the United States and a non-WTO member country using a satellite licensed by a WTO member country." Further Notice at ¶ 25. The Commission queries whether it should apply an ECO-Sat test to the non-WTO market sought to be served in such an instance. *Id.*

Columbia believes that the Commission should apply an ECO-Sat test to non-WTO route markets served by systems licensed by WTO member countries in instances where an entity that actually controls the satellite system is from the non-WTO state, and seeks to serve

that market. A company from a nation that is not subject to the WTO's requirements and dispute resolution procedures, should not be permitted to evade application of the ECO-Sat test simply by securing a license from a WTO member state. Regardless of the conclusion reached by the WTO Member concerning the acceptability of granting such a license, the Commission should undertake its own independent review before permitting service to the United States.

Columbia does not believe that such an approach would pose problems under the national treatment provisions of the WTO Agreement in that the focus of the would be the particular non-WTO "home" market to which the operator sought to offer service. Indeed, the same test would be applied were the foreign-controlled company to seek a U.S. license directly to serve its non-WTO market. As to the particular operators involved, there would thus be no disparity between the applicability within the U.S. licensing process and with respect to WTO-Licensed operators. Such a *de facto* "home" market analysis should help deter forum shopping by companies that benefit in their actual home markets from restrictive entry policies.

In addition, the Commission should also adopt its alternate proposal to deny U.S. market access entirely to those operators that agree to exclusionary arrangements in any market that they serve. *See* Further Notice at ¶ 43. Each license that is granted should include a provision conditioning its continued validity upon compliance with the prohibition on exclusionary arrangements. Licenses should be revoked where this condition is violated.

**B. The Commission Should Examine Whether U.S.-Based Companies Should Be Allowed To Obtain Satellite Licenses From Foreign Governments And Use This Authority To Enter The U.S. Market.**

The Commission should also not turn a blind eye toward U.S. companies circumventing the FCC licensing and fee process by securing licenses from foreign administrations, where regulatory requirements may be almost non-existent, and then using these licenses to offer service to and from the U.S. market. Just as the Commission should not automatically permit operators from non-WTO member countries to launch service between the U.S. and their home countries based on a license granted by a WTO member administration, neither should the Commission permit its policies and authority to be evaded via forum shopping by U.S. system operators.

In the past year the telecommunications trade press has reported on instances of U.S.-based telecommunications companies "buying" their way into the orbit resource through the purchase of orbit and spectrum registered with the ITU by small island-states. These mercantile arrangements may serve to avoid U.S. regulation, filing fees, regulatory fees and the plethora of U.S. rules and regulations, including United States international obligations which FCC-licensed systems must observe. Columbia does not object to U.S. companies entering into business arrangements with legitimate overseas-based satellite operators. Nor does Columbia believe that U.S. companies should forego mutually accommodating business opportunities, including ones which involve space-based telecommunications. We are very concerned, however, that the U.S. should not countenance, on the basis of sound telecommunications and trade policies, U.S.-based companies by-passing U.S. regulatory processes in favor of buying access to the orbit from lawless island-states, and then obtaining access to the U.S. market by virtue of our commitments

as a WTO member country. Should interference problems occur, these pseudo U.S. operators would be the first to come whining back to the U.S. government seeking assistance.

As a general matter, U.S. companies seeking to offer new service to the U.S. market (excluding legitimate joint ventures with existing operators) should be required to obtain a U.S. license to initiate service, regardless of whether a non-U.S. licensee would be permitted into the market based on such a license. Such an approach would not violate the spirit of the WTO Agreement, as it would not disadvantage non-U.S. companies vis-à-vis domestic operators. At the same time, U.S. companies themselves would not be damaged because the Commission would only be requiring them to obtain the same authorization that they have long been required to secure before offering service in the United States.

## III. Operators Providing Satellite Service To The U.S. Market Should Be Required To Comply With All FCC Operating Rules and Policies, But Should Not Be Separately Required To Meet U.S. Licensing Standards.

From the outset of this proceeding, the Commission has stated that it does not intend to require non-U.S. satellite operators seeking to access the U.S. market to be relicensed by the FCC. *See* Notice of Proposed Rulemaking, 11 FCC Rcd 18178, 18180 (¶ 2) (1996). However, some of the requirements that the Commission has sought to impose have crossed the line into areas that are clearly part of the U.S. licensing regime and serve no purpose in evaluating the eligibility of an already-licensed system to provide U.S. service. Requesting from non-U.S. satellite operators much of the same information required from U.S. applicants may not expressly violate the MFN provisions of GATS, but it would be unnecessarily burdensome and would set a poor example for other nations implementing the WTO Agreement. Accordingly, to conform with its pledge to avoid redundant licensing of foreign operators, the Commission should refine its

letter of intent approach and should limit the public interest criteria that it proposes to apply even to potential market entrants from WTO member countries.

Where a foreign operator has already received a license and ITU coordination has been completed, no technical or financial information is necessary, as these factors are purely aspects of U.S. licensee qualification. A company that has a foreign license has already demonstrated to a regulatory body that it is prepared to proceed with its proposal, and may already have a spacecraft in orbit. All that such a prospective market entrant ought to be required to submit is information identifying its legal ownership and, if applicable, the appropriate ECO-Sat showing.

For prospective operators not yet licensed and coordinated, however, technical information is also a necessity. The Commission might consider collecting this data, as well as proof of the filing of an application with a foreign administration, by simply having such parties submit copies of the information submitted in connection with their pending non-U.S. applications. However, because the FCC does not intend to apply its own financial standard to the applicant, no separate financial demonstration is necessary in this circumstance either (although whatever financial information is part of the non-U.S. application would, of course, be included).

Finally, with respect to WTO member nations, the Commission need not separately take into account "foreign policy" or "trade" concerns. *See* Further Notice at ¶ 37. These particular considerations were subsumed in the process that led to the WTO Agreement and have thus already been considered with respect to any effort by a member nation to enter the U.S. market. Some of the other factors enumerated by the Commission, however, must necessarily be

considered, at least in the rare circumstances where they are relevant. For example, evidence of illegal conduct, especially anti-competitive conduct, by the prospective operator would clearly constitute a basis for rejecting access to the U.S. market. In addition, legitimate national security concerns would merit additional scrutiny under the Commission's public interest review.

The foregoing notwithstanding, it is nonetheless appropriate that non-U.S. operators seeking to access the U.S. market be required to comply with U.S. technical and operating requirements, such as service coverage obligations and two degree spacing in the geostationary orbital arc. These are basic requirements that are fundamental to the U.S. regulatory schemes governing the satellite services to which they apply, and they must therefore be applied broadly to all entities that offer these services within U.S. borders. Failure to impose like requirements on all providers would result in market distorting disadvantages for those compelled to comply with the rules. In addition, in the case of two degree spacing, failure to impose the requirement uniformly would also disrupt proper coordination in the geostationary orbital arc.

## IV. Conclusion.

As discussed above and in its initial Comments and Reply Comments, Columbia urges the Commission to adopt the regulatory framework that it has proposed for entry by non-U.S. satellite systems into the U.S. market along with the modifications and additional safeguards suggested herein.

Respectfully submitted,

COLUMBIA COMMUNICATIONS CORP.

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August 21, 1997

# ATTACHMENT A

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

FEB 12 1997

Mr. Kenneth Gross
President and Chief Operating Officer
Columbia Communications
7200 Wisconsin Avenue, N.W.
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Bethesda, Maryland 20814

Dear Mr. Gross:

I am writing in reply to a letter of January 31, 1997, from your legal counsel, regarding the negotiations on basic telecommunications services at the World Trade Organization. The U.S. goal in these negotiations is to strengthen the ability of the U.S. satellite services industry to compete globally, and on a level playing field, with the inter-governmental satellite services organizations and with satellite service providers of other countries.

The United States has taken a number of steps to make certain that our key trade partners provide market access for satellite-based delivery of basic telecom services. Based on a note issued by the chairman of the negotiations in November, 1996, which has become part of the formal record of the proceedings, we have clarified the scheduling approach with regard to satellites. As a result, close to forty countries have made offers that would provide full market access for satellite-based delivery of all scheduled services, on an immediate or phased-in basis.

WTO members that make specific commitments on satellites will be subject to allocating and assigning frequencies in accordance with the principles of most-favored-nation and national treatment, as well as in accordance with the requirement for domestic regulations in the General Agreement on Trade in Services. Almost all of the countries making full satellite commitments have also adopted the reference paper on pro-competitive regulatory commitments. As a result, they will be obligated to provide additional regulatory safeguards with respect to allocation and use of radio frequencies.

A successful agreement on basic telecom services would also obligate those countries which have not made satellite commitments to provide treatment no less favorable to satellite service providers of the United States than the treatment provided to service suppliers of other countries. This would apply, for example, to how WTO members reach decisions regarding new market access arrangements involving service suppliers of other countries.

I share your deep concern regarding the possible distortive impact on competition in the U.S. satellite services market of certain proposals for restructuring INTELSAT. The United States has proposed a restructuring of INTELSAT that would lead to the creation of an independent commercial affiliate, INTELSAT New Corporation (INC). If made independent, the United

States believes that the creation of INC will enhance competition and help ensure the continuation of INTELSAT's mission of global connectivity for core services. As you are aware, however, many INTELSAT members are resisting the idea of independence for INC and we believe that a failure to achieve independence could adversely affect competition in the U.S. satellite services market. In the WTO negotiations we have taken pains to preserve our ability to protect competition in the U.S. market.

Our legal conclusion, for which there is a consensus among participants in the WTO negotiations, is that the ISOs do not derive any benefits from a GBT agreement because of their status as treaty-based organizations. The status of ISOs was discussed in detail in the GBT multilateral sessions. No delegation in the GBT negotiations has contested this conclusion.

We have also concluded that the United States cannot be forced to grant a license to a privatized ISO (should the ISO change its treaty status and incorporate in a country) or to a future privatized affiliate, subsidiary or other form of spin-off from the ISO. Existing U.S. communications and antitrust law, regulation, policy and practice will continue to apply to license applicants if a GBT deal goes into effect. Both Department of Justice and FCC precedent evidence long-standing concerns about competition in the U.S. market and actions to protect that competition. We have made it clear to all our negotiating partners in the WTO that the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anti-competitive results.

It has always been U.S. practice to defend vigorously any challenge in the WTO to allegations that U.S. measures are inconsistent with our WTO obligations. There is no question that we would do the same for any FCC decision to deny or condition a license to access an ISO or a future privatized affiliate, subsidiary or other form of spin-off from the ISO. For your information, Section 102(c) of the Uruguay Round Agreements Act, specifically denies a private right of action in U.S. courts on the basis of a WTO agreement. Therefore, a FCC decision is not subject to judicial review in U.S. courts based upon a WTO agreement, such as the General Agreement on Trade in Services.

The United States is confident that it would win if a U.S. decision went to WTO dispute settlement. If the United States did not prevail, however, we would not allow trade retaliation measures to deter us from protecting the integrity of U.S. competition policy.

I appreciate the support your firms' representatives have expressed for our objectives in the WTO negotiations.

Sincerely,

Charlene Barshefsky
United States Trade Representative-Designate

cc: Chairman Reed Hundt, Federal Communications Commission

FCC Secretary William F. Caton for inclusion in the rulemaking proceeding concerning the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (FCC 96-210, released May 14, 1996)

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